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July 3, 2002



**BY HAND DELIVERY**

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Room TW-B204
Washington, DC 20554

Re: CC Docket No. 96-98: Joint Comments of Cbeyond Communications, LLC, ITC^Deltacom Communications, Inc., KMC Telecom Holdings, Inc., NewSouth Communications, Corp., and XO Communications, Inc.

Dear Ms. Dortch:

In accordance with the Public Notice released by the Commission in above-referenced docket on June 3, 2002, please find attached for filing the signed original and seven (7) copies of the Joint Comments of Cbeyond Communications, LLC, ITC^Deltacom Communications, Inc, KMC Telecom Holdings, Inc., NewSouth Communications, Corp., and XO Communications, Inc.

Attached please also find a duplicate of this filing and a self-addressed envelope. Please date-stamp the duplicate upon receipt and return it envelope provided. Please do not hesitate to contact me at (202) 887-1211 if you have any questions or concerns regarding this filing.

Respectfully submitted,

Brett Heather Freedson

cc: Janice M. Myles, Wireline Competition Bureau, FCC

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**Before the**
**Federal Communications Commission**
**Washington, DC 20554**

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| Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 | ) ) ) | CC Docket No. 96-98 |

**JOINT COMMENTS OF**
**CBEYOND COMMUNICATIONS, LLC;**
**ITC^DELTACOM COMMUNICATIONS, INC.**
**KMC TELECOM HOLDINGS, INC.;**
**NEWSOUTH COMMUNICATIONS CORP., AND**
**XO COMMUNICATIONS**

Cbeyond Communications, LLC ("Cbeyond"), ITC^DeltaCom Communications, Inc. ("ITC^DeltaCom"), KMC Telecom Holdings, Inc. ("KMC Telecom"), NewSouth Communications Corp. ("NewSouth"), and XO Communications, Inc. ("XO")(collectively, "Joint Commenters"), by their attorneys, hereby submit these Comments in support of the May 17, 2002 Petition for Declaratory Ruling of NuVox, Inc. ("Petition") in accordance with the Public Notice released by the Commission in the above-captioned docket on June 3, 2002.[1] The Joint Commenters concur in NuVox's requests for declaratory rulings, as they generally have shared largely the same experience with unauthorized ILEC requests to audit circuits converted from special access to EELs.

## I. THE DECLARATORY RULINGS REQUESTED BY NUVOX ARE NECESSARY TO CURB ILEC ATTEMPTS TO UNDERMINE THE AUDIT LIMITATIONS ESTABLISHED IN THE *SUPPLEMENTAL ORDER CLARIFICATION*

The Joint Commenters strongly support NuVox's Petition for Declaratory Ruling. Like NuVox, Cbeyond, ITC^DeltaCom, NewSouth and XO also have been served with audit notices from BellSouth requesting an audit that is neither required nor permitted by the

[1] Public Notice, CC Docket No. 96-98, DA 02-1302 (June 3, 2002, corrected June 4, 2002).

Commission's June 2, 2000 *Supplemental Order Clarification*, in the above-referenced proceeding,[2] or their individual interconnection agreements with BellSouth.[3] XO also has been served with a noncompliant audit request by Sprint.

Moreover, in the audit requests served on several of the Joint Commenters, BellSouth actually goes beyond the audit request served on NuVox and attempts to extend its audit rights to encompass circuits other than those that have been converted from special access to EELs. Specifically, BellSouth has noticed its intent to make certain UNE loops and new EELs provisioned pursuant to state commission orders subject to an audit to determine compliance with the safe harbors established in the *Supplemental Order Clarification.* Clearly, both BellSouth's audit requests and its attempt to impose use restrictions on UNE loops and state commission ordered new EELs are unlawful.

In the *Supplemental Order Clarification,* the Commission explained that it had (in its *Supplemental Order*) determined that "IXCs may not convert special access services to combinations of loop and transport network elements" and that "this constraint does not apply if an IXC uses such combinations of unbundled network elements to provide a significant amount of local exchange service". *Supplemental Order Clarification* ¶ 5. It did not extent its temporary "constraint" to new EELs which it refused to make available in its *UNE Remand Order* (the Commission refused to address the issue of new EELs as its new combinations rules were then before the Eighth Circuit) or to new EELs that would eventually be made available by a number

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2 *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order Clarification, 15 FCC Rcd. 9587 (2000) ("*Supplemental Order Clarification*").

3 KMC Telecom has not been served with an EEL audit notice. However, it joins these comments to express its opposition to BellSouth's anticompetitive activities on this front – especially its attempt to audit and extend use restrictions to UNE loops and new EELs.

of state commissions pursuant to their authority under Section 251 and state law. Moreover, FCC rule 51.309(a) prohibits an ILEC from imposing use restrictions on UNEs.

These are just two additional examples – beyond those provided by NuVox – that underscore the need for action to curb ILEC abuses of the "limited" audit rights they were granted in the *Supplemental Order Clarification.* As set forth below, the Joint Commenters' experience with BellSouth in recent months is very much in accord with the account provided by NuVox in its Petition and Reply. Indeed, to the extent the experience differs for individual Joint Commenters, it typically has involved BellSouth demanding a more expansive audit and refusing to provide information on its selected auditor.

From a legal and policy perspective there are at least two compelling reasons why the Petition should be granted. First, the Petition should be granted so as to affirmatively put an end to ILEC efforts to expand the audit rights established in the *Supplemental Order Clarification.* BellSouth's stated position with respect to the Commission's mandate that audits will not be routine and will be undertaken only when a concern regarding compliance with the safe harbors clearly makes a mockery of the Commission's order. Thirteen-to-fifteen audit notices sent in succession over such a short timeframe suggest commencement of a campaign of routine audits and not the isolated review contemplated by the Commission. As NuVox asserted in its Reply, it appears that the Petition has stymied BellSouth, as it has virtually ceased issuing new EEL audit requests. Little more than a month ago, BellSouth management informed one of the Joint Commenters that it intended to audit every CLEC that converted special access circuits to EELs.

With respect to the "concern" the Commission established as the predicate for an audit, BellSouth's assertion that it need not share the concern with CLECs and that it need not be

bona fide or legitimately related to compliance with the safe harbors again makes a mockery of the plain language used by the Commission in its order.[4] At every turn, the Bell companies are undermining the Commission's authority and its legitimacy by serving up interpretations of Commission orders that were never intended at the time they were adopted and are simply not supported by the plain text of the orders. This is but one example.

If the Commission sits aside or even affirmatively permits the Bells to do this, its decision making process will be corrupted and its institutional legitimacy compromised severely. For example, Verizon now argues that the use restrictions adopted in the *Supplemental Order Clarification* now apply to new EELs – even though the Commission affirmatively declined to make new EELs available in its *UNE Remand Order*.[5] How could the Commission impose a restriction on something it declined to make available? BellSouth appears to have adopted Verizon's stance recently – although not one of the six states that require BellSouth to provide access to new EELs has imposed any sort of use restriction on them. It is quite plain that the Commission's existing rules (including the restored combinations rules adopted by the Commission in 1996) and orders (including the *UNE Remand* orders) do not impose use restrictions on new UNE combinations. If the Bells want such restrictions, they should petition for rulemaking. Their current confidence in their ability to twist existing rules and orders to serve their ends undermines the Commission's legitimacy and needs to be checked quickly and firmly.

The second reason the Commission must affirmatively put an end to ILEC EEL audit abuses is that they consume scarce CLEC regulatory resources and serve as a barrier to CLEC access to UNEs. Increasingly, CLECs must pick and choose their battles. On an item like

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4 BellSouth Opposition ¶¶ 7, 9.

5 *UNE Remand Order*, ¶¶ 478-79.

this, CLECs have no choice but to engage – no matter how frivolous the request.[6] These unauthorized noncompliant conversion audit requests already have successfully diverted resources from rulemakings and Section 271 filings. They are merely one component of BellSouth's comprehensive assault on competition and its competitors in particular (illegal systematic winback programs and rampantly anticompetitive provisioning practices are others).

Moreover, BellSouth's resource consuming audit campaign is yet another factor that makes carriers question whether the use of UNEs is worth it. This, of course drives competitors to special access -- which serves BellSouth at the expense of competitors and consumers alike. Although special access arbitrage and the maximization of special access revenues are paramount goals for BellSouth and other ILECs, neither is consistent with the Act or has any other valid legal or policy justification.

As an institutional matter, it is important to recall that the 1996 Act did not establish an arena where two heavyweights exchange blows before a referee. Recognizing that the Bells were the heavyweights and that their position as incumbents gave them inordinate advantages, Congress charged the Commission to level the field and take action to ensure that competition takes hold. CLECs cannot match the Bells blow-by-blow or lobbyist-by-lobbyist. If the Commission does not hear from CLECs enough, it is less likely due to a lack of concern and more likely due to the fact that CLECs are focused on running their businesses and do not have large numbers of employees dedicated to lobbying regulators on a daily basis. Thus, in order for the FCC to make the right decision, it must do more than referee. The record assembled already demonstrates that BellSouth has abused the audit right granted in the *Supplemental Order Clarification.* Not only should the Commission grant NuVox's Petition, it should suspend

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[6] Although BellSouth has not yet filed a state commission complaint against any of the Joint Commenters on this issue, it has threatened to do so.

BellSouth's right to audit any of the carriers identified as current audit targets for the duration of the time period during which its temporary use restrictions remain in place.

## II. THE DECLARATIONS REQUESTED BY NUVOX ARE CONSISTENT WITH THE *SUPPLEMENTAL ORDER CLARIFICATION*

Grant of the NuVox Petition is needed to ensure that both the substance and intent of the Commission's *Supplemental Order Clarification* is respected. In the Petition NuVox requested that the Commission make the following declarations:

- Audits may be undertaken only after notification by the ILEC of a specific, bona fide and legitimately related concern that a CLEC is not meeting any of the three "safe harbors" specified in the *Supplemental Order Clarification*;
- Upon meeting the standard set forth above, the ILEC must provide the requesting carrier proof that it has hired and paid (or will pay) for an *independent third party* to conduct the audit;
- A consulting shop comprised of principals with ILEC backgrounds that serve predominantly ILEC clients and who sell their services with claims that their "successful" audits have won millions of dollars for their ILEC clients does not satisfy the independent auditor requirement;
- In the event that a particular circuit is deemed noncompliant with any of the three safe harbors, (1) an ILEC may not convert the circuit back to special access prior to state commission review of the determination – if required by the parties' interconnection agreement or sought by one of the parties – and (2) an ILEC may not charge special access nonrecurring charges for the conversion, but may only charge the same cost-based billing-change/conversion charge that was imposed to convert the circuit from special access to UNEs in the first place; and
- With respect to shifting the cost of the audit from an ILEC to a CLEC, interconnection agreement terms govern, or, in the absence of such terms, an ILEC may seek reimbursement from a CLEC for only the share of the audit costs proportionally attributable to circuits found to be non-compliant.

For all of the reasons cited by NuVox in its Petition and Reply, each of these proposals is consistent with the letter and spirit of the *Supplemental Order Clarification* and is necessary to curb ILEC abuses of the limited auditing right granted to them by the Commission.

With respect to the "not routine" nature of the audits and the requirement that the ILEC have a "concern" regarding compliance, the experience of the Joint Commenters confirms that BellSouth has failed to comply with the Commission's *Supplemental Clarification Order*. It simply defies reason to call thirteen to fifteen audits noticed within roughly a two month span anything other than routine. Like NuVox, the Joint Commenters have received vague allegations of PIU reporting irregularities as the "concern" generating the audit requests. BellSouth's refusal to substantiate its allegations and establish any relationship between them and compliance of converted circuits with the safe harbors suggests that BellSouth's stated concerns are neither bona fide nor legitimate.[7] The suggestion made by BellSouth in its Opposition that the stated concern need not be bona fide nor legitimately related to compliance with the safe harbors is preposterous.[8] Moreover, the explanation of "flags that trigger concern" in its June 21, 2002 written *ex parte* have never been shared with or explained to CLECs before and appear to be little more than a post-hoc rationalization served up by BellSouth.

With respect to the independent status of the selected auditor, the Joint Commenters submit that an entity such as ACA is so conflicted by its nearly all ILEC personnel and client base that it is difficult to see how it could be viewed as independent. BellSouth's refusal to share certain information about ACA with certain Joint Commenters suggests that BellSouth also believes that the independence of the proposed auditor can fairly be questioned. As referred to in the Petition and as set forth in the attachments to NuVox's Reply, the information BellSouth withheld from most CLECs shows that the proposed auditor views a "successful" audit as one that results in additional revenue recovery for an ILEC. CLECs simply

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[7] BellSouth's alleged concerns also do not appear to tied to particular circuits converted. Since CLECs must certify compliance on a circuit-by-circuit basis, so too must an ILEC identify its concern regarding compliance.

[8] BellSouth Opposition, ¶ 9.

don't share this perspective and neither should the Commission. A successful audit should fairly determine compliance and certainly should not be clouded by the specter of potential or probable bias. To ensure this result, the Commission should bar entities with a significant amount of ILEC ties from serving in the role of an "independent auditor".[9]

With respect to potential issues raised by BellSouth's notices and a potential finding of noncompliance, the Joint Commenters strongly support NuVox's request that the Commission affirm deference to interconnection agreement terms. As NuVox contended and BellSouth – at times and to a limited extent – appears to concede, conversion audits must comply with both the *Supplemental Clarification Order* and the interconnection agreement terms pursuant to which the conversions were performed. Interconnection agreement dispute resolution provisions should govern disputes over audit results. Indeed several of the Joint Commenters served with notice of an audit has specific conversion audit dispute resolution provisions that mirror those contained in the NuVox interconnection agreement. The Commission should affirmatively reject BellSouth's pleas to excuse it from those negotiated and state commission approved safeguards now.

Finally, with respect to shifting the cost of an audit upon noncompliance, each Joint Commenter served with an audit notice by BellSouth can confirm that BellSouth has asserted that the *Supplemental Clarification Order* establishes a 20 percent noncompliance threshold for shifting the costs of an audit from an ILEC. While this threshold is employed commonly with respect to PIU audits and is sometimes incorporated into interconnection

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[9] The Commission previously has invoked standards adopted by the American Institute of Certified Public Accountants ("AICPA") to ascertain auditor independence. *In re Application of Ameritech Corp. and SBC Communications, Inc for Consent to Transfer Control,* CC Docket No. 98-141, Memorandum Opinion and Order (re/ Oct. 9, 1999), ¶ 504, n.923. The AICPA standards require auditors to "avoid situations that may impair the appearance of independence". *Id.* (citing AICPA Standards § 100.26). Accordingly, the Commission should bar the use of an ILEC consulting enterprise as an "independent auditor".

agreements, certain interconnection agreements contain no provision for shifting the costs of a conversion audit. Thus, the Joint Commenters support NuVox's request that the Commission affirm that the provisions contained in interconnection agreements govern. In the absence of such terms, the Commission should adopt a default so as to head off future disputes. Of the proposals submitted by NuVox (pro-rata) and BellSouth (20% threshold), Joint Commenters submit that the pro-rata proposal submitted by NuVox is appropriate in this context given the complexity of the safe harbors and the uncharted territory of establishing compliance therewith.

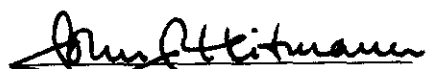
## III. CONCLUSION

Unless the Commission acts to prevent BellSouth and other ILECs from imposing resource-draining and noncompliant conversion audit requests on competitive carriers, BellSouth will not be the only ILEC implementing routine and blanket conversion audits. Such a development will have a chilling effect on competition by preventing access to UNEs, as those carriers that request conversions of special access circuits to EELs may not be able to devote sufficient resources to systematic ILEC conversion audits.

For all of the foregoing reasons, the Commission should grant the NuVox Petition in its entirety and should suspend BellSouth's audit rights for the duration of the applicability of the temporary use restrictions adopted in the *Supplemental Order Clarification.*

Respectfully submitted,

**CBEYOND COMMUNICATIONS, LLC,**
**ITC^DELTACOM COMMUNICATIONS, INC.,**
**KMC TELECOM HOLDINGS, INC.,**
**NEWSOUTH COMMUNICATIONS CORP., AND**
**XO COMMUNICATIONS, INC.**



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